IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.W.P.No.12183 of 2006
Date of decision: September 06 , 2006

M/s Krishna Udyog, Village Umedpur, Sahnewal, District Ludhiana

Petitioner
Through:
Mr.Jagmohan Bansal, Advocate

v.

Union of India and another

Respondents
Through:
Mr.Gurpreet Singh, Advocate

CORAM:

Hon'ble Mr.Justice Adarsh Kumar Goel
Hon'ble Mr. Justice Rajesh Bindal

1. Whether Reporters of local papers maybe allowed to see the judgment ?

2. To be referred to the Reporters or not ?

3. Whether the judgment should be reported in the Digest?

Rajesh Bindal, J.

The petitioner has approached this Court by filing the present writ petition seeking issuance of a writ of certiorari praying for quashing of public notice No.17 (RE-2006)/2004-09 dated 2.6.2006, issued by the Director General of Foreign Trade in exercise of powers conferred on him under paragraph 2.4 of Foreign Trade Policy, 2004-2009.

The petitioner, in the present case, has not challenged the terms of the amended policy as such. The only challenge is that amended terms of the policy cannot be made applicable to the transactions, which have already been completed before the amendment took place by giving the same retrospective effect.

Briefly, the facts, as pleaded in the petition, are that the petitioner is a proprietorship concern carrying on its business of importing and trading of

vanaspati oil falling under Chapter Heading 15 of the Customs Tariff Act. The petitioner entered into an agreement with the foreign supplier on May 16, 2006 for supply of vanaspati oil. In pursuance of the agreement, advance payment was sent on May 26, 2006 through banking channel. Later, the goods were shipped on June 9, 2006, as is evident from the certificate of origin and bill of lading (Annexure P.2). The material reached CFS, Ludhiana in the third week of June, 2006. The clearance of goods has not been sought by the petitioner because, on enquiry, he came to know that he will be made liable to pay duty at the rate of 80% as against `Nil' duty. This was for the reason that by way of impugned public notice dated June 2, 2006, the import of vanaspati oil from Sri Lanka, as per Indo-Sri Lanka Free Trade Agreement, has been exclusively permitted to National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED).

The import of goods into and export of goods out of the country is governed and controlled by the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter described as `the 1992 Act'). The relevant provisions thereof are extracted below:

> "3. **Powers to make provisions relating to imports and exports:-**
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> (1)The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.
>
> (2)The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods.
>
> (3)All goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under Section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.
>
> Section 5: **Export and import policy:-** The Central Government may, from time to time formulate and announce, by

> notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy."

Section 3 of the 1992 Act enables the Central Government to make provisions for development and regulation of foreign trade by facilitating imports and increasing exports by Order published in the Official Gazette and also to make provisions of prohibiting, restricting or otherwise regulating import or export of goods in the like manner.

Section 5 of the 1992 Act enables the Central Government to formulate and announce by way of notification in the Official Gazette, the export and import policy. It is further provided that the amendment of the policy was also possible in the same manner.

The Government of India entered into an agreement with Sri Lanka, called as "Free Trade Agreement". In terms of the agreement, goods imported from Sri Lanka are not subject to customs duty. In furtherance to Free Trade Agreement, referred to above, Notification No.26/2000-Cus., dated 1.3.2000 was issued in exercise of powers under Section 25 of the Customs Act, 1962 (for short, `the 1962 Act'), exempting the goods, which are of Sri Lanka origin. The relevant extract of the Notification is reproduced as under:

> "In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962) the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods of the description specified in column (3) of the Table hereto annexed and falling under the Chapter, heading No. or sub-heading No. of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), specified in the corresponding entry in column (2) of the said Table, from so much of that portion of the applied rate of duty of customs as is specified in the corresponding entry in column (4) of the said Table, subject to the following conditions namely:-
>
> (1)The importer proves to the satisfaction of the Deputy Commissioner of Customs or the Assistant Commissioner of

> Customs , as the case may be, in accordance with the Customs Tariff (Determination of Origin under the Free Trade Agreement between the Democratic Socialist Republic of Sri Lanka and the Republic of India) Rules, 2000 published with the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.19/2000-Customs (N.T.), dated the Ist March, 200 that the goods in respect of which the benefit of this exemption is claimed are of the origin of Sri Lanka."

In exercise of power conferred under Section 5 of the 1992 Act, the Foreign Trade Policy 2004-2009 (for short, `the Policy') was notified by the Central Government.

Chapter 1 of the Policy contains preamble to the Policy and its objective which are as under:

> "**Objectives**
>
> Trade is not an end in itself, but a means to economic growth and national development. The primary purpose is not the mere earning of foreign exchange, but the stimulation of greater economic activity. The Foreign Trade Policy is rooted in this belief and built around two major objectives. These are:
>
> (i) To double our percentage share of global merchandise trade within the next five years; and
>
> (ii) To act as an effective instrument of economic growth by giving a thrust to employment generation."

In Chapter 1A under the heading `Legal Framework' guidance for amendments and transitional arrangements have been provided for in Paras 1A.3, 1A.4 and 1A.5, which are extracted below:

> "**1A.3 Amendments**
>
> The Central Government reserves the right in public interest to make any amendments to this Policy in exercise of the powers conferred by Section 5 of the Act. Such amendment shall be made by means of a Notification published in the Gazette of India.
>
> **1A.4 Transitional Arrangements**

Any Notification made or Public Notice issued or anything done under the previous Export/ Import Policies, and in force immediately before the commencement of this Policy shall, in so far as they are not inconsistent with the provisions of this Policy, continue to be in force and shall be deemed to have been made, issued or done under this Policy.

Authorisations, certificates and permissions issued before the commencement of this Policy shall continue to be valid for the purpose and duration for which such authorisation, certificate or permission was issued, unless otherwise stipulated.

1A.5 In case an export or import that is permitted freely under this Policy is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted notwithstanding such restriction or regulation, unless otherwise stipulated, provided that the shipment of the export or import is made within the original validity of an irrevocable letter of credit established before the date of imposition of such restriction."

Chapter 2 thereof provides for general provisions regarding imports, relevant paras thereof are extracted below:

"**2.1 Exports and Imports free unless regulated**

Exports and Imports shall be free, except in cases where they are regulated by the provisions of this Policy or any other law for the time being in force. The item-wise export and import policy shall be, as specified in ITC (HS) published and notified by Director General of Foreign Trade, as amended from time to time.

2.4 Procedure

The Director General of Foreign Trade may, in any case or class of cases, specify the procedure to be followed by an exporter or importer or by any licensing or any other competent authority for the purpose of implementing the provisions of the Act, the Rules and the Orders made thereunder and this Policy. Such procedures shall be included in the Handbook (Vol.1), Handbook (Vol.2), Schedule of DEPB Rate and in ITC (HS) and published by means of a Public Notice. Such procedures may, in like manner, be amended from time to time.

The Handbook (Vol.1) is a supplement to the Foreign Trade Policy

and contains relevant procedures and other details. The procedure of availing benefits under various schemes of the Policy are given in the Handbook (Vol.1).

2.5 Exemption from Policy/Procedure

Any request for relaxation of the provisions of this Policy or of any procedure, on the ground that there is genuine hardship to the applicant or that a strict application of the Policy or the procedure is likely to have an adverse impact on trade, may be made to the Director General of Foreign Trade for such relief as may be necessary. The Director General of Foreign Trade may pass such orders or grant such relaxation or relief, as he may deem fit and proper.

The Director General of Foreign Trade may, in public interest, exempt any person or class or category of persons from any provision of this Policy or any procedure and may, while granting such exemption, impose such conditions as he may deem fit. Such request may be considered only after consulting Norms Committee (NC) if the request is in respect of a provision of Chapter-4 (excluding any provision relating to Gem & Jewellery sector) and EPCG Committee if the request is in respect of a provision of Chapter 5 of the Policy/Procedure. However, any such request in respect of a provision other than Chapter 4, Chapter 5 and Gem & Jewellery sector as given above may be considered only after consulting Policy Relaxation Committee."

In terms of powers conferred on the Director General of Foreign Trade, as per para 2.4 of the Policy, Handbook of Procedures (Foreign Trade Procedures) (for short, `the Handbook') was issued by him. The object of the Handbook, contained in para 1.2 of Chapter 1 thereof, is extracted below:

"**1.2 Objective**

The objective of this Handbook is to implement the provisions of the Foreign Trade (Development and Regulation) Act, 1992, the Rules and Orders made thereunder and the Foreign Trade Policy (2004-09) incorporating the Export and Import Policy (2002-07) by laying down simple, transparent and EDI (Electronic Data Interchange) compatible procedures which are easy to comply with and administer for

efficacious management of foreign trade."

In the reply filed by the respondents, it is pleaded that spurt in import of duty free vanaspati oil from Sri Lanka resulted in substantial effect on the domestic industry, which caused concern to the Government. The matter was considered at the highest level and the Ministerial Group was constituted under the Chairmanship of Director General of Foreign Trade. The recommendations of the Inter-Ministerial Group were to restrict the import of duty free vanaspati oil from Sri Lanka to India to a maximum of 2.5 lacs metric ton per annum and it was further approved that this import should be channelised through NAFED. Accordingly, a public notice was issued on June 2, 2006 by Director General of Foreign Trade providing that only NAFED shall make import of vanaspati oil shortening and margarine under the Indo-Sri Lanka Free Trade Agreement.

At this stage, it will also be appropriate to reproduce public notice dated June 2, 2006. The same reads as under:

> "D.G.F.T. Public Notice No.17 (RE-2006)/2004-09 dated 2.6.2006.
>
> Vanaspati oil fats (Vanaspati oil) – Import under Indo-Sri Lanka FTA only by NAFED
>
> Subject: **Procedure for import of vanaspati oil fats (vanaspati oil) under the Indo-Sri Lanka Free Trade Agreement.**
>
> Attention invited to Government of India, Ministry of Finance (Department of Revenue) Notification No. 26/2000-Customs, dated 1.3.2000 (amended from time to time) related to India-Sri Lanka Free Trade Agreement.
>
> In exercise of powers conferred under paragraph 2.4 of the Foreign Trade Policy, 2004-09, as notified in the Gazette of India extraordinary Part II, Section 3 Sub Section (ii) and as amended from time to time, the Director General of Foreign Trade hereby makes the following arrangements.
>
> Only National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED) shall make import of Vanaspati oil shortening and margarine under the Indo- Sri Lanka Free Trade Agreement.

This issue in public interest."

In view of the public notice issued by the Director General of Foreign Trade, the consignments already in pipe line were either to be withheld by the Customs Authority or higher rate of customs duty became payable thereon.

It is conceded case of the respondents in the written statement that as the issue of public notice dated June 2, 2006 created problems in trade circle with reference to the consignments in pipeline, on consideration of various representations a clarification was issued by the Director General of Foreign Trade that under para 1A.5 of the Policy, the firms which have already opened irrevocable Letter of Credit before the date of issue of public notice dated June 2, 2006 may be allowed to import vanaspati oil.

It is further pleaded that subsequently a notification No. 22 (FE-2006)/ 2004-2009 dated July 24, 2006 was issued by the Government of India, Ministry of Commerce and Industry, Department of Commerce, in exercise of powers conferred by Section 5 of the 1992 Act read with para 2.1 of the Policy, making the following amendments in the Policy:

> "Import of Vanaspati from Sri Lanka under India-Sri Lanka free Trade Agreement shall be allowed freely in such cases where the Bill of Lading is dated 1st June, 2006 or before."

Once in terms of clause 1A.5 contained in the Policy, the respondents have themselves decided to permit the parties to import vanaspati oil from Sri Lanka who had opened irrevocable Letter of Credit before the date of issue of public notice on June 2, 2006, we find no justification in denying the same benefit to the petitioner who had sent entire amount in advance to the exporter in Sri Lanka before the date of issue of public notice.

In the present case, undisputed facts are that the petitioner after having entered into an agreement with Sri Lankan suppliers on May 16, 2006 had sent total payment in advance through banking channel on May 26, 2006 and

the goods were shipped on June 9, 2006.

Accordingly, the writ petition is allowed and it is held that in the facts and circumstances of the case, where an importer had sent entire payment in advance before the date of issue of public notice, shall also be entitled to import duty free vanaspati oil from Sri Lanka as has been permitted by the respondents to the persons, who had opened irrevocable Letter of Credit before the date of issue of public notice.

(Rajesh Bindal)
Judge

(Adarsh Kumar Goel)
Judge

September 06 , 2006
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